Pleasant Travel Services, d/b/a Kauai Coconut Beach Resort *and* Hotel Employees and Restaurant Employees, Local 5, AFL–CIO, Petitioner. Case 37–RC–3657

June 28, 1995

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS STEPHENS, BROWNING, AND COHEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 26, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 50 for and 64 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings and recommendations,[1] only to the extent consistent with this decision. Contrary to the hearing officer, who found that Petitioner's Objection 9 was meritorious, we overrule the objections in their entirety and certify the results of the election.

During the critical period preceding the election, the Employer announced, to the employees, that it would not disclose the amount of a pending pay raise until after the election to avoid the appearance of interference with the election. Prior to the critical period, the Employer announced that there would be a pay raise on April 1. Although the amount had been decided, this was not announced.

The hearing officer reasoned that withholding the amount of the raise interfered with the election because: (1) but for the election petition (filed on March 16), the employees would have been granted a 2-percent wage increase on April 1, before the May 26 election; (2) the Employer announced during the critical period that the amount of the employees' pay raise would not be disclosed until after the election; and (3) the fact that the Employer withheld the scheduled wage increase, raised the question of the amount, then declined to disclose the predetermined and customary amount, meant that the Employer was using a ''fist inside the velvet glove.'' The hearing officer found that, while the message to the employees was subtle, it gave an inference of improper motivation. The hearing officer concluded that this conduct constituted objectionable conduct which warranted setting aside the election.

The Employer excepts. It argues that its refusal to announce the amount of the expected pay increase was not objectionable because it delayed the announcement to avoid the appearance of interference with the election. We agree.

The facts are not in dispute. The petition was filed on March 16, 1994.[2] On April 4, approximately 8 weeks before the election on May 26, the Employer's general manager, Brian Allen, posted and distributed a memorandum to the employees regarding a pay increase that had been announced approximately March 1. The memorandum states:

> It has been our practice to give pay raises twice a year on April 1st and October 1st. In accordance with that practice, we had scheduled a pay raise effective April 1, 1994. You will receive that pay raise effective April 1, 1994. However, in order to avoid the appearance of interference with the NLRB Representation Election, the amount of your pay raise will not be disclosed to you until after the election is held. You will receive the pay regardless of the outcome of the election. The pay raise will be retroactive to April 1, 1994. We appreciate your Kokua[3] and look forward to telling you the amount of your pay raise immediately after the election.

On May 6, Union Secretary-Treasurer Anthony Rutledge sent a letter to the president of the Employer, copies of which were distributed to employees. The letter alleged that Allen was committing an unfair labor practice by withholding the scheduled wage increase, and requested that the Employer correct the error. Allen responded in a letter to the employees that if Rutledge thought an unfair labor practice had been committed, a charge would have been filed with the NLRB. But, the letter went on, the Union knew that the law had not been broken by deferring announcement of the amount of the raise.

Allen testified that the Employer gave a 2-to 3-percent raise in October 1992. In April 1993, a scheduled raise was deferred after a hurricane struck that had caused severe damage. In October 1993, employees were given a nonretroactive 2-percent raise. In March 1994, before the petition was filed, the Employer determined that it would give a 2-percent increase in April. The Employer announced a wage increase for April, but not the amount. Allen testified that in April the Employer deferred the raise and withheld the announcement of the amount because the Employer did not wish to interfere with the election and did not want the employees to feel that they were being ''bought off.'' Allen's response to Union Secretary-Treasurer Rutledge's May 6 letter stated at least twice that the announcement of the amount of the pay raise would be

[1] The Petitioner withdrew its Objection 1, 5, 8, and 10. In the absence of exceptions, we adopt, pro forma, the hearing officer's overruling of the Petitioner's Objection 2, 3, 4, 6, 7, 11, and 12.

[2] All dates are 1994 unless otherwise indicated.

[3] Hawaiian word meaning help or assistance.

deferred until after the election ''to avoid the appearance of interfering with the election process.''

The general rule is that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. Thus, an employer may not inform employees that it is withholding wage increases or accrued benefits because of union activities. Conversely, however, an employer may tell employees that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference.[4] We find that the instant case is in the latter category.

Clearly the Employer was faced with a dilemma. If it granted the wage increase, it would assume the risk and burden of justifying it. Alternatively, it could, as it did, advise its employees that it was deferring the wage increase until after the election to avoid the appearance of interfering with the election. Although the Employer did have a policy of scheduling wage increases for April and October of each year, this practice dates back only to October 1992, and there was at least one deviation from this policy—the withholding of any increase in April 1993. The record supports, and we find, that the Employer had a reasonable doubt as to whether it could meet its burden of justifying any granting of a pay increase during the critical period and that it acted for that reason.

Further, there is no evidence that the Employer deferred the announcement of the amount of the pay increase for any reason other than to avoid the appearance of interference with the election. There is no evidence that any agent of the Employer told employees anything different from the Employer's April 4 memorandum. Employee Adrian Levinthol testified that when he questioned the hotel's personnel director, Carol Nacion, about the raise being withheld, he was told in effect that they (management) did not want anybody to think they were bribing employees, so the raise was being held, just until after the election. Thus, in the Employer's postpetition communications with its employees, it consistently and unequivocally stated that it was declining to announce the amount of the pay raise until after the election for the sole reason that it wanted to avoid the appearance of interfering with the election process.

There also is no evidence that the Employer's action was otherwise linked to any union activity, or that the Employer considered altering the amount of the increase based on the election results. Allen assured the employees that the raise would be given after the election and that it would be made retroactive to April 1. Immediately following the election, the Employer granted the raise retroactive to April 1.

[4] *Emergency One, Inc.*, 306 NLRB 800, 807 (1992); *Montana Lumber Sales*, 185 NLRB 46, 49 (1970); and *Uarco Inc.*, 169 NLRB 1153, 1154 (1968).

Our colleague would overturn established Board law to reach a contrary result. We see no reason to depart from precedent. To the contrary, we believe that the reasons for the precedent are well illustrated in this case. Our colleague contends that the Employer could have granted the 2-percent increase on April 1, *with the assurance that the increase would be found proper by the Board*. We do not think that the law in this area, as applied to the facts of this case, is as crystal clear as our colleague believes it to be. In our view, the Employer could reasonably be concerned that the increase, if granted, would be condemned as unlawful or objectionable. In this regard, we note that the past practice (semiannual increases in April and October) dates back only to October 1992, and there was a deviation in April 1993. Further, the amount of the increase did not follow a uniform pattern. In these circumstances, we believe that the Employer could have a reasonable doubt concerning whether the increase would pass muster with the Board. Accordingly, it explained its dilemma to the employees, and told them that the increase would be given after the election, effective April 1, irrespective of the outcome of the election. We believe that such candor is easily understood by employees. The established law permits such candor; our colleague would not.

Based on the above, we overrule Objection 9, and certify the election results.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Hotel Employees and Restaurant Employees, Local 5, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER BROWNING, dissenting.

Contrary to my colleagues, I would affirm the hearing officer's recommendation and set aside the election on the basis of Petitioner's Objection 9. I find that the Employer interfered with the election by postponing until after the election the scheduled pay raise that the Employer had announced it would grant to unit employees.

The record shows that the Employer has a practice of giving pay raises two times a year, on April 1 and October 1. In early March 1994,[1] the Employer announced to employees that it planned a wage increase for April 1. Although the Employer had determined that the raise would be 2 percent, it did not inform the employees of the amount of the raise they would be receiving. The petition was filed on March 16, and the election was scheduled for, and held on, May 26.

On April 4, the Employer notified the employees that their pay raise was being deferred until after the

[1] All dates are in 1994 unless stated otherwise.

representation election, and that the raise would be retroactive to April 1. The Employer's memorandum distributed to the employees stated that ''in order to avoid the appearance of interference with the NLRB Representation Election, the amount of your pay raise will not be disclosed to you until after the election is held.''[2]

An employer is generally required to grant wage increases while a representation petition is pending as if the petition had never been filed.[3] The Board has held, however, that an employer does not engage in objectionable conduct by deferring a scheduled wage increase provided that the employer makes clear in its statements to employees that the only reason it is postponing the expected pay raise is to avoid the appearance of interference with the election.[4] The Board reasoned in *Uarco*, supra, that when an employer announces that its sole purpose in postponing an expected pay raise is to avoid the appearance that it sought to interfere in the election, employees could not reasonably conclude that the employer's postponement of adjustments in their rates was intended to influence their decision in the election.

I disagree with that premise, and I would overrule *Uarco* and the subsequent Board precedent which permits an employer to postpone expected wage increases or benefit improvements during the preelection period so long as it couches that deferral in the right ''magic'' words. Instead, I would find that an employer engages in objectionable conduct by deferring a regularly scheduled wage increase until after the election, unless there is a legitimate economic exigency warranting such deferral and that reason is communicated to the employees. In a situation, as here, where there is a definite, established practice of granting regularly scheduled wage increases, employees will not reasonably be misled into believing that the employer is attempting to interfere with the election if the employer grants the wage raise as scheduled. On the contrary, an employer's postponement of an expected wage increase or benefit because of an impending election would have the reasonable tendency to interfere with employees' free choice, because such a postponement would convey to employees the message that the presence of the union and the election was depriving them for a period of time of a wage raise or benefit which they otherwise would have received earlier.[5]

Contrary to my colleagues' assertion, this Employer was not ''faced with a dilemma'' of having to choose between ''the risk and burden of justifying'' the grant of a wage increase during the preelection period and announcing the postponement of that increase. The Employer easily could ''justify'' the wage increase to employees by referring to its established practice. Thus, the Employer had an objective reason to which it could point for the granting of the April pay raise, and employees would not reasonably believe that the Employer was attempting to interfere with the election by ''bribing'' them to vote against union representation. Here, payment of the wage increase on April 1 would have constituted nothing more than simply what the employees expected to receive. This is not a situation where prior wage increases had been provided in a haphazard or irregular fashion, and therefore the Employer would have difficulty explaining to employees the timing of the increase. See, e.g., *Village Thrift Store*, 272 NLRB 572 (1983). In fact, the Employer's April 4 announcement to employees that the effective date of the scheduled increase would be postponed stated that ''[i]t has been our practice to give pay raises twice a year on April 1st and October 1st. In accordance with that practice, we had scheduled a pay raise effective April 1, 1994.''

One of the dangers of allowing an employer to defer a scheduled and expected wage increase is that such a postponement suggests to employees that the employer may manipulate the amount of the increase depending on the outcome of the election. That danger is clearly illustrated here. In telling the employees that the announced wage increase was being postponed, the Employer expressly raised the amount of the increase as an issue and then told the employees that it would not disclose the amount of the wage increase until after the election. In my view, this action clearly conveyed to the employees the possibility that the Employer would adjust the amount of the pay raise based on how they voted in the election.

In sum, where an employer has an established practice of granting periodic wage increases or has announced before the filing of a petition that it intends to grant a wage raise or a benefit, I believe that any deviation from that practice or announcement tends to interfere with employees' free choice in the election,

[2] The Employer, in fact, gave the employees a 2-percent wage increase in June, after the election. This raise was retroactive to April 1.

[3] *The Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967).

[4] *Emergency One, Inc.*, 306 NLRB 800, 807 (1992); *Truss-Span Co.*, 236 NLRB 50 (1978); *Montana Lumber Sales*, 185 NLRB 46, 49 (1970); *Uarco Inc.*, 169 NLRB 1153, 1154 (1968). See also *Centre Engineering, Inc.*, 253 NLRB 419 (1980).

[5] Even if the employer makes the wage raise retroactive, such a postponement still would interfere with employees' free choice because the employer would have departed from an established practice and employees' wages would have been less than expected for the sole reason that they had chosen to file a representation petition. Thus, retroactive payment of the raise does not alter the fact that the employees would have been without their expected raise for a period of time, and—absent the employer's payment of interest—the employees would have suffered an economic loss.

even if the employer declares that it is postponing the effective date of the raise or benefit in order to avoid interfering in the election. In the circumstances where employees are entitled to or are expecting a wage raise before the election, I see no reason to create an exception to the Board's well-founded principle that an employer has a duty during a preelection campaign period to proceed with the granting of wage raises or benefits exactly as it would have done had the union not been on the scene. Accordingly, I would affirm the hearing officer, sustain Petitioner's Objection 9, and direct that a new election be held.